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Published in:
German Law Journal

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2016

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Tolsma, H. D., & de Graaf, K. J. (2016). Bending the Rules: A Dutch Approach to Improving the Flexible Application of Environmental Standards. *German Law Journal*, 17(4), 691-704.

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Bending the Rules: A Dutch Approach to Improving the Flexible Application of Environmental Standards

By Hanna Tolsma^{} & Kars de Graaf^{**}*

Abstract

Environmental standards should not be a hindrance for economically relevant projects — especially in the fields of sustainability and green energy. Therefore, the Dutch legislature implemented experimental instruments in the Crisis and Recovery Act to improve the flexible application of environmental standards. They did this by allowing competent authorities to deviate from these standards. This article analyzes this Dutch approach, which can be characterized as “bending the rules.” Are these instruments legally sound and how are the relevant provisions applied in practice? Dutch government is currently working on a fundamental change of the system of environmental law with a new Environment and Planning Act. Should this new system of environmental law include a general permanent provision to deviate from environmental standards? This article provides environmental scholars with some lessons that can be learned from the Dutch Approach.

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A. Introduction

Environmental law is sometimes seen as an obstacle to development. There is a tension between the wish to expedite valuable development on the one hand, and the collective desire to protect vulnerable environmental qualities on the other. A common complaint regarding the Netherlands' current system of environmental law is that it is not flexible enough.¹ Environmental rules—spatial planning law, building law, nature conservation law, and others—should not be obstacles for economically relevant projects utilizing spatial development, especially in the fields of sustainability and green energy. The Dutch legislature has implemented instruments that attempt to improve the flexibility of the regulatory system by allowing competent authorities to deviate from environmental standards.² Initially, to combat the economic crisis, temporary legislation was introduced which allowed for deviation from certain environmental standards for so-called “experimental development areas” and “innovative projects.” In practice, these provisions were applied to projects such as sustainable soil management, small scale wind turbines in industrial zones, and the transition of a business area into a residential one.

The Dutch government is working on a fundamental system change by restructuring Dutch environmental, spatial, and planning laws into one Environment and Planning Act (EPA, in Dutch *Omgevingswet*). On July 1, 2015, the House of Representatives, with the support of a large majority, adopted the legislative proposal of the EPA.³ Next, the proposal was submitted to the Senate and was adopted on March 22, 2016.⁴ One objective is to make the initially temporary provisions permanent. These ideas have generated a lot of criticism, especially from legal scholars. They see problems with regard to legal certainty and judicial review. They argue that the legal instruments that allow competent authorities to deviate from environmental rules will infringe upon the road to sustainability. Other scholars argue that these provisions do not go far enough. They suggest that a new system of environmental law should provide competent authorities with even more flexibility to set aside a norm of environmental law. Therefore, according to these scholars, a more general provision to deviate from environmental standards should be included in the new EPA.⁵

¹ See Chris Backes, *Integraal en Flexibel Omgevingsrecht - Droom of Drogbeeld?*, 6 *REGELMAAT* 347, 347 (2012).

² See, e.g., the Dutch *Interimwet stad-en-milieubenadering* (Interim Act Implementing A City-and-Environment Approach), <http://wetten.overheid.nl/BWBR0019466/>.

³ Report Plenary Meeting Parliament 2014/2015, No. 103, Item 20, <https://zoek.officielebekendmakingen.nl/h-tk-20142015-103-20.html>.

⁴ Official Government Gazette April 26, 2016, 156, <https://zoek.officielebekendmakingen.nl/stb-2016-156.html>.

⁵ See generally Hanna Tolsma, *Balanceren Tussen Economie en Milieu in de Omgevingswet: de Integrale Belangenafweging bij Besluitvorming over Projecten*, 87 *NEDERLANDS JURISTENBLAD* 2889 (2012).

This article analyzes the Dutch approach which “bends the rules” by allowing competent authorities to deviate from environmental standards. This article starts with an introduction of the current instruments provided by the Dutch Crisis and Recovery Act (CRA). Are these instruments legally sound? How are these provisions applied in practice? Subsequently, this article addresses the discussion about introducing a general provision which would allow competent authorities to deviate from environmental standards. After that, this article will explore the EPA, the extent to which the new proposed regulatory framework would allow deviation, and the government’s choices in creating the EPA. The article finishes with our conclusions and provides several final remarks on the topic.

B. Instruments to Temporarily Deviate from Environmental Standards

I. Legal Framework

The instruments that allow for deviations from current environmental standards are found in the CRA which came into force in 2010.⁶ The Netherlands employs this special act as a measure to combat economic crisis. Its goal is to alleviate the economic crisis and to promote the recovery by introducing measures to accelerate the decision-making process and court proceedings on a wide variety of economically relevant projects. Initially, the CRA was a temporary act that was meant to expire on January 1, 2014. In 2013, the government suspended the expiration of the CRA for an unspecified period of time. The objective is to implement the CRA in the proposed EPA.⁷ One important element of the CRA is an experimental set of rules on so-called development areas and innovative projects.⁸

1. Development Areas

The CRA offers municipalities tools for putting urban development back on track if progress has been impacted by environmental regulations. The CRA provides local authorities with the power to allow temporary deviations from the applicable environmental standards when developing a specific area with a maximum of ten years, and with the power to oblige businesses to implement certain environmental measures.⁹ The reasoning behind these provisions is that environmental standards should not be an obstacle for economically

⁶ See Jonathan Verschuuren, *The Dutch Crisis and Recovery Act: Economic Recovery and Legal Crisis?*, 13 POTSCHERSTROOM ELECTRONIC L. J. 5, 8 (2010).

⁷ See Parliamentary Papers II 2011/12, 33 135, No. 4, <https://zoek.officielebekendmakingen.nl/kst-33135-4.html>; see also discussion *infra* Section C.II.

⁸ Crisis and Recovery Act, Chapter 2, <http://wetten.overheid.nl/BWBR0027431/>.

⁹ Crisis and Recovery Act, Arts. 2.2–2.3a., <http://wetten.overheid.nl/BWBR0027431/>.

relevant projects like spatial development, especially in the areas of sustainability and green energy. To better understand this idea, it may be beneficial to understand how these spatial projects work: Specific areas in the Netherlands are designated by an Order in Council called the "Decree Implementing the CRA." These areas are designated by the central government after being recommended by the Minister of Infrastructure and Environment. An area can be added to the list if it is appropriate, particularly with a goal towards strengthening the sustainable spatial and economic development of that area.¹⁰ Article 2.3(7) of the CRA contains a limited list of legislation from which deviation in environmental standards is allowed, such as the Noise Abatement Act, the Soil Protection Act, and the Nature Protection Act. The Decree Implementing the CRA describes, more specifically, which provisions allow for deviation. Local authorities have to regulate the temporary deviations in their municipal land-use plan. Such land-use plans in the sense of the Spatial Planning Act, have to meet some extra conditions. For example, a plan must be focused on the optimal use of the physical environment with a goal of reinforcing the sustainable spatial development of that area. This must be done in conjunction with establishing good environmental quality.¹¹

2. Innovative Projects

Article 2.4 of the CRA allows competent authorities to deviate from certain environmental standards that create obstacles to implementing innovative projects. For policy reasons, environmental rules should not be an obstacle for activities that stimulate the efficient use of energy or the exploitation of renewable energy sources. Similar to the spatial projects described above, projects are designated by the central government based on a recommendation from the Minister of Infrastructure and Environment in a Decree Implementing the CRA. Public authorities or companies can also identify projects that they want to add to the Decree by sending an application to the Minister. A project can be added to the Minister's list if it meets the following conditions: According to the CRA the experimental activities shall contribute to innovative developments, combat the economic crisis, and promote sustainability. Article 2.4 of the CRA contains a limited list of selected legislation from which deviations are allowed, such as the Water Act, the General Environmental Law Act, and the Spatial Planning Act. The Decree Implementing the CRA regulates what constitutes an allowable deviation, the maximum duration of the deviation, and the manner in which it is determined whether the deviation corresponds to its purpose or needs to be adjusted.

¹⁰ *Id.* Art. 2.3(1).

¹¹ *Id.* Art. 2.2.

II. Legal Problems Pointed Out in Literature

The CRA was written and enacted in great haste. It was therefore no surprise that this act has met great criticism from the academic world. The provisions on development areas and innovative projects raise many practical and legal questions.¹²

For example, it is not clear how the vague criteria for designating a development area or innovative project is used by the central government. At this point the provisions do not seem to be in line with the applicable general demands for experimental regulations set out in Article 10a and 10b of the Note for regulation.¹³ Any legal basis that supports experimental regulations should be restricted and described as accurately and concretely as possible. A clear and accurate description will provide a safeguard against arbitrary application. The goal and function of possible experiments must be mentioned in the legal basis. This is important with regard to the evaluation of the projects. Furthermore, the specific provisions or parts of the regulation which can be deviated from must be clearly stated. In the case of the CRA, all these requirements are regulated in the governmental decree.

Another weak point of the provision regarding development areas is the lack of legal guarantee for the measures required to meet environmental standards when deviation is no longer allowed. In development areas, only a temporary deviation is allowed with a ten-year maximum. After that period of deviation, the local government is held responsible for the implementation of measures required to meet the environmental standards.¹⁴ This duty of care, however, is not a guarantee to the interested parties hindered by the deviation that the environmental standards will be met.¹⁵

With regard to innovative projects, it is even less clear what happens with the experiment after the deviation term ends. Should the experiment also end? Article 7 of the Decree

¹² See generally Marloes Brans, *Het Gebiedsontwikkelingsplan; de Nieuwe Rekbaarheid in het Milieurecht*, HOOFDSTUK 2 CRISIS- EN HERSTELWET, DE EXPERIMENTEERFASE VOORBIJ? 3 (2011).

¹³ See Aaldert ten Veen & Valerie van 't Lam, *Ontwikkelingsgebieden. Een Regeling Waarmee Ruimtelijke Ontwikkelingen Mogelijk Kunnen Worden Gemaakt, Maar die Wel Enige Aanpassingen Behoeft*, MILIEU EN RECHT 634, 636 (2009); Anne-Marie Klijn & Hiskia Stam, *Gebieds- en Innovatie-Experimenten in de Crisis-en Herstelwet*, 3 TIJDSCHRIFT VOOR BOUWRECHT 56, 63 (2010).

¹⁴ Crisis and Recovery Act, Art. 2.3(10), <http://wetten.overheid.nl/BWBR0027431/>.

¹⁵ See Tonny Nijmeijer, *Tijdelijk afwijken van milieukwaliteitsnormen. (Geen) zorgen voor morgen?*, 3 TIJDSCHRIFT VOOR BOUWRECHT 42, 49 (2010); see also Frans Otten, *De Relatie Tussen het Gebiedsontwikkelingsplan Op Basis Van de Crisis- en Herstelwet en Milieunormen*, in GOED VERDEDIGBAAR: VERNIEUWING VAN BESTUURSRECHT EN OMGEVINGSRECHT 441, 448 (2011).

implementing CRA seems to suggest that the period in which deviation is allowed can be adjusted. This leaves—in theory—room for an indefinite period. It is not entirely clear if interested parties can use legal remedies, such as judicial review or other legal instruments, to compel the authority to enforce the environmental standards.¹⁶

III. Practice

How are the provisions regarding development areas and innovative projects applied in practice? The CRA does not contain an obligation to evaluate the experimental set of rules on development areas and innovative projects. Instead, the government decided to monitor the application of these provisions. Every year the government reports the progress of the application of these instruments to the Lower House. The information in this section is based on those reports.¹⁷

1. Development Areas

In total, twenty-nine development areas have been designated since 2010. The wide variety in the type and nature of the designated areas is notable. Seventeen cases concern former industrial areas transformed into, or combined with, a living and working environment. The development area of Nuland-Oost in the Dutch municipal Maasdonk is a useful example. This relatively small project is aimed at the development of 300 houses and the restructuring of an industrial area. Environmental standards hinder the development of the project which involves the removal of a recycling company. The provisions of the CRA allow for deviation from these obstructing standards. The CRA offers the possibility to temporarily deviate from these environmental standards. Development may begin on a residential area, instead of waiting for the removal of the recycling company from the area. The city port of Rotterdam is an example of a relatively large project. Noise pollution and provisions on external safety make the development of residential areas in this project complex. In six other designated areas, the relation between living and working environments hinders the development of infrastructural projects, such as a railway zone or the implementation of a highway. Furthermore, industrial areas have been designated to establish a more optimal economic usage of the space provided. For the most part, the rules from the Noise Abatement Act form an obstacle for urban development in designated areas. In some cases, smell- nuisance or external safety rules cause difficulties.

It is important to note that the designation of a development area does not automatically mean that the flexibility of the CRA is used in practice. Practice shows municipalities take a

¹⁶ Nijmeijer, *supra* note 15, at 43.

¹⁷ Praktijkervaringen Crisis- en herstelwet. Voortgangsrapportage 2014–2015, Ministerie van Infrastructuur en Milieu (Jan. 18, 2016) (reporting on the latest progress of the application of these instruments).

lot of time—sometimes even a few years—to adopt a land-use plan. About fourteen of these land-use plans are still being prepared. In eight cases, it was deemed possible to develop the designated area without using the instruments of the CRA. This is because the local authority and other involved parties find creative solutions for area developments that have been stalled because of issues with the applicable environmental standards. These municipalities do not need to apply the extra competencies to deviate from the environmental standards that were awarded to them in the CRA. The ability of municipalities to apply the extra instruments of the CRA has created a positive impulse to find solutions that fit within the regular legal framework.

2. Innovative Projects

In total, one hundred sixty-seven innovative projects have been designated since 2010. They concern a wide range of activities such as: Building sustainable houses, small-scale wind turbines in industrial zones, an energy-neutral floating “eco-home,” a floating autarkic recreation bungalow, and a reciprocating compressor turbine combination. For illustrative purposes, we will briefly discuss the project of small-scale wind turbines. In order to stimulate building small-scale wind turbines, industrial zones of seven municipalities have been appointed as so-called “rule free zones” for a period of ten years.¹⁸ In this rule free zone, small-scale wind turbines are able to be constructed without building permits—a deviation from Article 2.1(1) of the General Act on Environmental Permitting.¹⁹ Furthermore, deviation is allowed from certain binding rules of the Dutch Environmental Activities Decree.²⁰ A specific division of the Environmental Activities Decree is applicable to wind turbines and contains, for example, the provision that “A wind turbine is assessed on the safeguards, maintenance and repairs necessary by an expert in the field of wind turbines at least once per calendar year.”²¹ Deviation from this provision is allowed. Also, a higher noise standard of forty-seven decibels during the day instead of forty-one decibels on the façade of sensitive buildings is allowed on sites located along the boundaries.²²

It is noteworthy that an “innovative project” does not always refer to a new technique. The designated innovative projects can be divided into four categories: New techniques, sustainable building, fewer rules and proceedings, and experiments with future legislation

¹⁸ Decree Implementing the CRA, Art. 3(1), <http://wetten.overheid.nl/BWBR0027929/>.

¹⁹ *Id.* Art. 3(3).

²⁰ *Id.* Art. 3(4).

²¹ Dutch Environmental Activities Decree § 3.2.3, <http://wetten.overheid.nl/BWBR0022762/>.

²² Decree Implementing the CRA, Art. 3(5), <http://wetten.overheid.nl/BWBR0027929/>.

such as the proposed EPA. Furthermore, it is worth mentioning that flexible rules and the possibility of deviation from environmental standards does not always result in more lenient rules. Practice shows that Article 2.4 of the CRA is also used to set stricter norms. For example, the project regarding the development of a residential area in the municipal of Meppel in which deviation of the building code was allowed to set stricter insulation values for walls and roofs.²³ Finally, experience has shown that implementing more flexible regulations alone is no guarantee for the realization of sustainable energy projects—see the rule free zones mentioned above as an example. There seems to be very little interest in the development of small-scale wind turbines in these rule free zones. Only a few small-scale wind turbines have been completed. Therefore, it can be said that this innovative project's contribution to sustainable energy is relatively limited.

C. Movement Toward a General Permanent Provision to Deviate

I. Debate on Bending the Rules

One of the main points of criticism on the legal framework of environmental law in the Netherlands is the lack of flexibility.²⁴ Utilizing the CRA, the government seized the opportunity to introduce the experimental set of rules on development areas and innovative projects that provide more flexibility. Still, a common complaint regarding current environmental law is that its application in projects for area development results in missed opportunities for improving the environmental and spatial quality.²⁵ Although the vast majority of decisions fit perfectly within the applicable legislation, legislation is sometimes considered an obstacle for projects that contribute to sustainable development and optimal environmental quality. During the development of the EPA, a small group of scholars raised the idea of codifying in a provision a so-called principle of “positive proportionality.” The scholars defined the principal as “demand[ing] a fair alignment between the desired project and all involved interests.”²⁶ These scholars believe that this principle of positive proportionality should be a voluntary assessment by the initiator of the project for the benefit of other citizens and businesses.

When someone applies for a permit including arguments based on positive proportionality, we

²³ *Id.* Art. 6(c).

²⁴ See generally Friso de Zeeuw et al., *Doorbreek de impasse-Tussen Milieu en Gebiedsontwikkeling*, TU DELFT (2009) (describing this so-called deadlock between environmental protection and area development).

²⁵ See Friso de Zeeuw et al., *Knelpunten omgevingsrecht voor gemeenten*, TU DELFT (2012).

²⁶ See Harm Borgers & Jurgen van der Heijden, *Positive Positive Law: A Dworkinian Move in Dutch Environmental Law*, SOC. SCI. RES. NETWORK 1, 7 (2012), www.ssrn.com/abstract=2121526.

suggest the administration is obliged to include this in the assessment of the permit request it would make anyway. In our opinion this will give a major incentive to the initiator of a project to work on an advantageous combination of interests that is good for both the project and a sustainable environment... Together with the other principles the principle of positive proportionality gives all involved actors the opportunity to assess why this singular legal standard in this case must be pushed aside, in order to get to a full and balanced result.²⁷

In March 2012, the government outlined the future EPA in its notice to Parliament. This first outline of the EPA also included the principle of positive proportionality. The government used the following description: "Indien het belang van de leefomgeving zich er niet tegen verzet, kan van individuele normen worden afgeweken, mits bepaalde belangen hierdoor niet onevenredig benadeeld worden."²⁸ This could be translated as follows: "If the interests of the environment do not object, deviation from individual standards may be allowed, provided that this does not disadvantage certain interests disproportionately."

The academic world responded with some criticism to this generic approach for bending the rules.²⁹ For example, it is not clear how this principle of positive proportionality exactly relates to the classic principle of proportionality. The classic principle of proportionality demands that no unjustified imbalance may develop between the desired development and the interests that might be harmed.³⁰ A fundamental remark is that the concept of positive proportionality is not in line with the conditions applicable in the Dutch democratic constitutional state and, more specifically, the Dutch rule regarding purpose-specific powers.³¹ Introducing such a principle carries a risk that important environmental standards will be ignored by the competent local authorities when deciding on a particular local project.

²⁷ *Id.* at 10.

²⁸ Parliamentary Papers II 2011/12, 33 118, No. 3, 18, <https://zoek.officielebekendmakingen.nl/kst-33118-3>.

²⁹ See Tolsma, *supra* note 5, at 2889.

³⁰ See Ben Schueler, *Of heeft u liever negatieve onevenredigheid?*, MILIEU EN RECHT 241, 241 (2012).

³¹ Backes, *supra* note 1, at 347; Tolsma, *supra* note 5, at 2889.

In response to the government's notice, the Advisory Division of the Dutch Council of State emphasized that a "carte blanche provision," which provides local authorities the power to deviate from environmental standards whenever they want, is not desirable. Arbitrariness in the balancing of interests by competent authorities will diminish legal certainty for individuals and businesses.³²

II. New Dutch Environment and Planning Act

The government is working on the restructuring of Dutch environmental law and spatial planning law. The EPA (adopted by the Senate on March 22, 2016) has not yet entered into force. Prior to the EPA entering into force it is necessary to adopt an Implementation Act and an Implementation Decree that will amend existing legislation to align with the new act.

The rationale for a fundamental system change is that current and future challenges concerning the human environment cannot be tackled effectively using the current instruments. These instruments are based on a large range of statutory regulations. The EPA intends—possibly in 2019—to replace fifteen existing acts, including the General Act on Environmental Permitting, the Water Act, and the Spatial Planning Act, and incorporate the area-based components of eight other acts. In the future, other acts may also be incorporated, including a new Nature Conservation Act.³³ The EPA can be qualified as a framework act. The content mainly deals with procedural aspects and the current substantive environmental norms will be largely delegated to implementing legislation. The government is currently working on clustering and streamlining 120 existing governmental decrees into four new governmental decrees that will be based on the EPA.

One could say a lot about this ambitious fundamental system change.³⁴ We focus on the following question: To what extent will the new proposed regulatory framework allow competent authorities to deviate from environmental standards? The proposed Article 23.3 of the EPA is relevant in that respect. This provision on experimental projects builds upon Article 2.4 of the CRA dealing with innovative projects. There are important differences, however. First, the scope of the criterion used in order to designate an experimental project in the EPA is much wider than that of the CRA. Article 23.3 of the EPA gives the central government the power to designate projects which—considering the interest of sustainable

³² See Parliamentary Papers II 2011/12, 33 118, No. 3, Annex 158168, 19, <https://zoek.officielebekendmakingen.nl/blg-158168.html> (advising on the fundamental system change of the legal framework of environmental law).

³³ Parliamentary Papers II 2015/16, 33 962, No. 186, <https://zoek.officielebekendmakingen.nl/kst-33962-186.html>.

³⁴ See Kars de Graaf & Hanna Tolsma, *The Future Environment And Planning Act And The Impact Of The Crisis And Recovery Act: Country Report The Netherlands*, 5 IUCN ACAD. ENVTL. L. JOURNAL 293 (2015) (discussing the main features of the EPA).

development—aim to achieve and maintain a safe and healthy physical environment and a good environmental quality.³⁵ Second, the government seized the opportunity to improve the procedural and substantive safeguards of the experimental provision. As we mentioned in Section B.II of this article, Article 2.4 of the CRA lacks guarantees. Article 23.3(3) of the EPA sums up the requirements that have to be incorporated in the governmental decree: The goal of the experiment, the competent authority responsible for the implementation, the duration of the experiment, and which deviations from environmental standards are allowed after the expiration of the experiment. Furthermore, it must include which deviation is allowed, for which area or decision the deviation is allowed, and state the maximum permissible duration of the deviation—with a maximum of ten years in the case of environmental values (*omgevingswaarden*).³⁶ The governmental decree must also explain how the project will be monitored and evaluated. Additionally, it is worth mentioning that if a project results in an adjustment of a regulation, the minister has the power to delay the deviation while considering these adjustments.³⁷ Finally, with regard to the governmental decree, the existence of a special procedure (*voorhangprocedure*) ensures the involvement of Parliament.³⁸

Initially, the government intended to include both the principle of positive proportionality³⁹ and the provisions about “development areas” in the EPA.⁴⁰ Both concepts, however, did not make it to the final proposal sent to Parliament. The government reasoned that it was unnecessary to have a general provision that authorizes local authorities to set aside environmental standards and grant permission for projects. Research has led to the conclusion that the need to allow for flexibility in the application of environmental standards has solely been proven in the fields of noise abatement and soil protection.⁴¹ These fields of

³⁵ Environment and Planning Act, Art. 23.3(2), <https://zoek.officielebekendmakingen.nl/stb-2016-156.html>.

³⁶ *Id.* Art. 23.3(3).

³⁷ *Id.* Art. 23.3(8).

³⁸ Parliamentary Papers II 2013/14, 33 962, No. 3, 609, <https://zoek.officielebekendmakingen.nl/kst-33962-3.html>; Environment and Planning Act, Art. 23.5, <https://zoek.officielebekendmakingen.nl/stb-2016-156.html>.

³⁹ Parliamentary Papers II 2011/12, 33 118, No. 3, <https://zoek.officielebekendmakingen.nl/kst-33118-3.html>. See also discussion of the principle of positive proportionality *supra* Section C.I.

⁴⁰ On February 28, 2013, a first draft regarding the concept of the text of the proposal was presented to several institutions for formal consultation (*Toetsversie Omgevingswet*). The text of this first draft, which was not officially published by the government, is available online for the general public. Arts. 4.17 - 4.18 of this first draft corresponds to the provisions on development areas in the CRA. These development areas were discussed in Section B of this Article.

⁴¹ Parliamentary Papers II 2013/14, 33 962, No. 3, 267, <https://zoek.officielebekendmakingen.nl/kst-33962-3.html>.

regulation, however, are already under construction to allow for more flexibility. Furthermore, one point of departure in drafting the EPA was to introduce more discretion and flexibility so that solutions can be tailored to specific situations. The government's perspective is that flexibility in particular should be built into the legal framework itself. If the rules provide flexibility for deviation in specific situations, there is no need for a general provision in the EPA that would allow deviation from environmental standards. Once the rules that include arrangements for flexible application are set, the ability to deviate from environmental standards should be limited. Therefore, the government introduced instruments that can be tailored to specific circumstances. The EPA includes, for example, a generic provision on equivalence when applying generally binding rules.⁴² The EPA together with the implementing legislations provide sufficient instruments to create flexibility in the application of environmental standards and, as a result, there is no need for specific provisions in development areas.⁴³

III. Reflection

We agree with the choice made by the government to exclude the principle of positive proportionality—as proposed in literature—from the EPA proposal. We believe that the necessity of such a radical instrument can be seriously questioned. The experiences with the CRA show that the provisions on development areas that allow competent authorities to deviate from environmental standards are hardly ever used in practice. It is remarkable that the government does not refer to the fundamental criticism by academics and the Council of State when justifying its choice to exclude such a general provision in order to deviate from environmental standards.

Furthermore, we expect that the specific provisions in the CRA on development areas, which will expire when the EPA comes into force, are not going to be missed in practice. The proposal for an EPA seems to provide more than enough flexibility. This Article did not discuss all the instruments included in the legislative proposal that will improve the flexibility of the regulatory system. It is worth mentioning that even the Advisory Division of the Dutch Council of State points out that there is a risk that flexibility will be valued more than legal certainty in the new system of environmental law that is being considered.⁴⁴

Finally, some reflections on Article 23.3 of the EPA: On the one hand, this experimental provision does not seem to be in line with the demands for experimental regulations. The

⁴² Environment and Planning Act, Art. 4.7, <https://zoek.officielebekendmakingen.nl/stb-2016-156.html>.

⁴³ Parliamentary Papers II 2013/14, 33 962, No. 3, 268, <https://zoek.officielebekendmakingen.nl/kst-33962-3>.

⁴⁴ Parliamentary Papers II 2013/14, 33 962, No. 4, 46, <https://zoek.officielebekendmakingen.nl/dossier/33962/kst-33962-4.html>.

scope of the experiments that can be designated are hardly limited by the vague criterion used.⁴⁵ Based on the experiences with the current experimental provision, however, we do not expect irresponsible or unreasonable application of Article 23.3 of the EPA in the future. On the other hand, the government's proposal for an EPA is a considerable improvement for it stipulates extra procedural and substantive conditions and requirements.

D. Final Considerations

It is often said that environmental standards should not be in the way of economically relevant projects—especially in the field of sustainability and green energy. The Dutch government believes that the current system of environmental law in the Netherlands is not sufficiently flexible and that it results in missed opportunities to improve the quality of the environment. In 2010, the Dutch legislature therefore implemented instruments to improve the flexible application of environmental standards by allowing competent authorities to deviate from environmental standards. What lessons can be learned from this Dutch approach?

First, the experiences in the Netherlands show that, in most cases of urban development areas, there is no need to bend the rules. The desired development projects fit perfectly within the current regulatory system of environmental law and therefore the competent authorities may in many cases allow the project to be realized. This data confirms that the perception that environmental standards are an obstacle to project development is not true. One could also claim that—with regard to complex urban area development—the current environmental law is already sufficiently flexible. An obvious recommendation is, therefore, to underpin necessity with empirical data before implementing radical provisions that allow for bending rules. Second, in practice, more flexible regulation alone is no guarantee for the realization of projects. The role of the law should not be overestimated. Other important factors include finance, administrative decisiveness, and civil service culture.

From a legal point of view, the power to deviate from environmental standards can be qualified as a radical instrument to provide flexibility because local authorities are given the power to set aside standards established by Parliament. More flexibility results in less legal certainty for individuals and businesses. Valuable developments at the expense of vulnerable environmental qualities must be prevented. Therefore, a very demanding legal procedure is required. General conditions for the application of such a provision should at least require that a project is monitored and evaluated, that there is a legal guarantee that the measures required to meet environmental standards are met, and that the legal rights of people directly affected by the project are safeguarded. In the past, the Dutch legislature

⁴⁵ See discussion *supra* Section B.II.

had paid far too little attention to such legal safeguards when allowing public authorities to bend the rules. With the provisions in the legislative proposal for an EPA concerning experimental projects, and the competence to deviate from environmental standards,⁴⁶ the Dutch system of environmental law will achieve a better balance between flexibility and legal safeguards for judicial control and provide greater legal certainty than it had under the CRA.

⁴⁶ Environment and Planning Act, Art. 23.3, <https://zoek.officielebekendmakingen.nl/stb-2016-156.html>.